UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

(caption continued on next page)

PLAINTIFFS' RESPONSE TO MOTION FOR REVIEW BY THREE-JUDGE COURT OF ORDERS OF DECEMBER 8, 2011, AND DECEMBER 20, 2011

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011 JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

SUMMARY

Late Friday, the legislature made its third attempt in as many weeks to block the disclosure of its contractors' work on redistricting to plaintiffs and the Court. This most recent attempt is its "Motion for Review by Three-Judge Court of Orders of December 8, 2011 and December 20, 2011" (Dkt. 84). The motion maintains that Judge Stadtmueller was "in error" when he alone entered those orders. Brief in Support of Motion for Review (Dkt. 85) ("Brief") at 2.

The Court twice before has rejected the legislature's request for relief and the arguments offered for it, and the Court should do so again. "It would 'be both unseemly and a misuse of public assets' to permit an individual hired with taxpayer money 'to conceal from the taxpayers themselves otherwise admissible evidence' of allegedly unconstitutional motives affecting their voting rights." Dec. 20 Order (Dkt. 82) at 4 (quoting *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002)). After initially refusing to produce two

witnesses for deposition based on blanket assertions of privilege, the legislature now refuses to accept the Court's "blanket" and repeated rejection of those claims. Brief at 11.

This matter will be tried beginning on February 21, 2012. The depositions of Joseph Handrick, Adam Foltz, and Tad Ottman were taken on December 20, 21, and 22. The discovery burdens all rest with plaintiffs. Notwithstanding their efforts—with written discovery and, last week, three non-party depositions—the process of fact-finding has been frustrated by the legislature's refusal, in league with defendants, to permit their witnesses to answer questions at their depositions. In all, no fewer than 72 times, counsel for the legislature and for the state instructed the three deponents not to answer questions posed by plaintiffs' counsel at the depositions. *See* Declaration of Douglas M. Poland ("Poland Decl.") ¶¶ 11, 15, 18.

Meanwhile, six weeks into a twelve-week discovery period, neither defendants nor the legislature have produced any documents reflecting legislative intent—which is not only "relevant," this Court has held, but also "extremely important" to plaintiffs' claims under the Voting Rights Act and Equal Protection Clause. Dec. 8 Order (Dkt. 74) at 3. Indeed, the legislature continues to withhold from production, based on continued assertions of privilege, documents that appear to go to the heart of plaintiffs' claims. *See* Poland Decl. ¶¶ 16, 19, Ex. 11, 13. For its part, the Department of Justice continues to maintain a "hear no evil, see no evil" approach to discovery, maintaining that its only "clients" are the Government Accountability Board ("GAB"), which—by the state's own admission—had nothing whatsoever to do with redistricting. To date, discovery is not the cooperative effort this Court envisioned. *See* Dec. 8 Order at 5.

The "Motion for Review" can and should be denied based on procedural grounds alone. Although both orders at issue were decided "[b]efore WOOD, *Circuit Judge*, DOW, *District*

Judge, and STADTMUELLER, *District Judge*," the legislature argues that only Judge Stadtmueller stands behind them because they bear only his signature. The legislature has no appellate recourse to this panel, however, because the full panel already has resolved these issues—twice.

There has been only one change to the same arguments the panel has read at least twice before. There can no longer be any doubt, if there ever were, that the legislature deliberately tried to create a "bubble" around redistricting to try to keep the judicial process and the public at bay. It contracted its constitutional responsibility, at public expense, to a lobbyist. It sent its own staff to work in the offices of a law firm across the street from the Capitol building with the hope of borrowing the attorney-client privilege.

Indeed, the reach of the latest motion exceeds the reach of its predecessors. The legislature wants the Court to conclude that "any acts or communications of Mr. Handrick that would be privileged if personally performed by the Legislature should be privileged and shielded from discovery." Brief at 2; *accord*, *id.* at 5, 20, 21. Joseph Handrick—a lobbyist, not a lawyer, with no unique expertise and not a member of the legislature—should be treated, in other words, as if he were both a lawyer giving legal advice and as a legislator. It is a breathtaking assertion. And it should be rejected.[1]

FACTUAL BACKGROUND

Plaintiffs and defendants exchanged initial Rule 26 disclosures on November 16, the first day of discovery. *See* Scheduling Order (Dkt. 35) at 2; Poland Decl. ¶ 2, Ex. 1, 2. The only names defendants disclosed were those of individuals at the GAB who could address "the implementation of the new redistricting map." Poland Decl. ¶ 2, Ex. 2 at 2. Only after plaintiffs

[1] Although the legislature does not raise this issue in its motion, testimony and documents of Messrs. Foltz and Ottman have also been improperly withheld on the basis of a privilege that this Court explicitly concluded is inapplicable. That will, if necessary, be the subject of a motion to compel.

moved to compel adequate Rule 26 disclosure did defendants—on November 25—identify Messrs. Handrick, Foltz, and Ottman as individuals who "assisted in determining the . . . boundaries for the state and Congressional districts." *See id.* ¶ 3, Ex. 3 at 5-6 (Defendants' Amended Disclosures). And, other than one expert, they named no one else.

The Court, taking "defendants at their word that they do not intend to call any individuals sought" by plaintiffs, declined to compel further disclosures but stressed that it "will not suffer 'sandbagging' by either party" and "will not tolerate a party 'hiding the ball' until a later stage in the litigation." Nov. 30 Order (Dkt. 61) at 3-4. In light of the expedited time-table, the Court recognized that "delays in the discovery process will create significant logistical issues for everyone associated with the case." *Id.* at 4.

Plaintiffs promptly issued subpoenas *duces tecum* to Messrs. Handrick, Foltz, and Ottman on November 22, noticing depositions for December 1 and 2; service attempts commenced the next day. Poland Decl. ¶¶ 4-5. Mr. Handrick was personally served on November 28. *Id.* ¶ 5. Mr. Ottman was served only on December 4, following repeated attempts to locate him at the Capitol and at residential addresses. *Id.* Although a receptionist at the Capitol accepted service on Mr. Foltz's behalf on November 23, the legislature later objected that the subpoena had not been personally delivered; the subpoena was reissued, but Mr. Foltz could not be located for personal service on December 5, 6, or 7. *Id.* ¶¶ 5-6, Ex. 6.

The legislature moved to quash Mr. Handrick's subpoena on November 30 (Dkt. 63) and Mr. Ottman's on December 6 (Dkt. 72). Making sweeping assertions of privilege and irrelevance, the legislature insisted that no discovery of any kind—no testimony, no documents—could be obtained from either witness.

The Court denied both motions on December 8 (Dkt. 74). After rejecting the legislature's relevance argument, the Court concluded that (1) the communications of Mr. Handrick, acting as a consultant, "are not covered by attorney-client privilege"; (2) the legislature "waived its legislative privilege to the extent that it relied on . . . outside experts for consulting services"; and (3) even without the waiver, plaintiffs' need is sufficient to overcome the legislature's qualified privilege. Dec. 8 Order at 3-4. The Court disapproved of the legislature's "refus[al] to accept service on behalf of its staff and consultants," expressing again its expectation of cooperation going forward. *Id.* at 5.

On December 13, the legislature moved "for clarification" of the Court's December 8 Order (Dkt. 77). Plaintiffs responded three days later (Dkt. 80). The Court, ruling on December 20, denied the motion in every respect except to clarify Mr. Handrick's employment and profession (lobbyist and consultant, not attorney). Recognizing the motion as one "for reconsideration," the Court reached the same conclusions as before: "attorney-client privilege does not apply to Mr. Handrick's opinions and conclusions," his "work product is not protected by privilege," and "privilege does not afford protection to Mr. Handrick's communications with the Legislature's outside counsel." Dec. 20 Order (Dkt. 82) at 3-5.

Messrs. Handrick, Foltz, and Ottman were deposed on December 20, 21, and 22.[2] Poland Decl. ¶¶ 10, 14, 17. The Court's December 20 order was filed at 2:50 p.m. with Mr. Handrick's deposition then underway. *Id.* ¶ 12. After reviewing the order in a recess, counsel for the legislature expressed an intention to pursue appellate relief. *Id.* ¶ 13. In response, plaintiffs

[2] The legislature attached selected excerpts from last week's depositions as exhibits to its motion. In responding to the legislature's motion, plaintiffs cite extensively to pages of the deposition transcripts beyond those relied on by the legislature. To provide a complete context for the testimony cited by the legislature and plaintiffs, complete copies of the deposition transcripts are submitted with plaintiffs' brief as exhibits to the Poland declaration.

agreed not to file a motion to compel testimony and documents for which assertions of privilege had been made before December 30.

In total, defendants' and the legislature's counsel instructed Mr. Handrick not to answer on the basis of privilege 45 separate times. Poland Decl. ¶ 11. Over the following two days, at the direction of their counsel, Messrs. Foltz and Ottman withheld a significant number of relevant documents from production pursuant to subpoenas and refused to answer a combined total of at least 27 deposition questions on the basis of attorney-client and legislative privilege. *Id.* ¶¶ 15-16, 18-19.

To date, only a handful of documents have been produced in Rule 26 disclosures and in response to plaintiffs' subpoenas and requests for production. Whole categories of documents have been withheld. Poland Decl. ¶¶ 16, 18, Ex. 11, 13.

ARGUMENT

I. NO FULL-PANEL "REVIEW" CAN BE HAD OF ORDERS ALREADY ENTERED BY THE FULL PANEL.

At the outset, this Court may well dispose of this latest motion for its procedural flaws. The motion rests on the assumption that only Judge Stadtmueller stands behind the Court's orders and that, under 28 U.S.C. § 2284(b)(3), those orders are appealable to Judge Wood and Judge Dow. Yet the orders begin with this: "Before WOOD, *Circuit Judge*, DOW, *District Judge*, and STADTMUELLER, *District Judge*." The orders were entered "BY THE COURT"—a court that, as set forth in the preamble, consists of three judges. Indeed, the order of Chief Judge Easterbrook designating the panel characterizes this Court as a "*three-judge* district court." Sept. 21, 2011 Order (Dkt. 24) at 1 (emphasis added). When the orders repeatedly reference "the Court," they presumably are referring to the three-judge panel. Judge Stadtmueller signed the orders, but he also signed nearly every other order entered by the Court, including the initial

scheduling order that followed a hearing by the three-judge panel. *See* Scheduling Order (Dkt. 35) at 4. The procedural avenue afforded by subsection (b)(3) applies only if, in fact, a decision is that of one judge acting alone.

The authority that the legislature cites is of no aid to the relief it seeks. The single case on which the legislature relies overturned an order of a district court judge—and member of a three-judge panel—that materially affected an order previously issued by the full panel. *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm'n*, 260 U.S. 212 (1922). In rejecting an argument that the order "was the act of the court of three judges," the Supreme Court observed that it was "certain that Judge Foster was the only judge sitting in the District Court when the ex parte application was made," and it was "certain that these orders were signed only by him and did not purport to be authorized by three judges." *Id.* at 217. The orders at issue here, to the contrary, do in fact "purport to be authorized by three judges," even if they bear the signature of only one.

That Judge Stadtmueller signed the orders would suggest only that he issued them on behalf of the panel. This panel's "Order Denying Defendants' Motion to Dismiss" (Dkt. 25) was a "PER CURIAM" decision that bore no signature. Under the legislature's theory, the absence of any signature would mean no member of the panel partook in the decision. The Court's discovery orders of December 8 and 20 are, by contrast, facially decisions of the panel issued by Judge Stadtmueller. Whether an order is issued *by the panel* is reflected in the preamble, not the signature line. Opinions of any three-judge panel on the Seventh Circuit proceed in like fashion, listing the three judges "before" whom a matter is heard, followed by the name of the authoring judge—the only difference being that, at the Seventh Circuit, the author's name appears before the opinion rather than as a signature.

Having already (twice) rejected the legislature's assertions of privilege, the panel need not and should not do so again. Section 2284(b)(3) cannot be invoked for review of decisions by the full panel, and the motion can be denied on that ground alone.

II. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY TO COMMUNICATIONS BETWEEN MR. HANDRICK AND PRIVATE LEGAL COUNSEL.

The merits, should the panel choose to reach them, also require that this motion be denied. The attorney-client privilege "is in derogation of the search for the truth and, therefore, must be strictly confined." *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000). Yet the legislature continues to claim that a *blanket* privilege protects *all information* in Mr. Handrick's possession. As the legislature's counsel explained at Mr. Handrick's deposition, "It is our position that *any information* sought from Mr. Handrick is privileged pursuant to one of three privileges, the legislative privilege, attorney-client privilege, and attorney work product privilege." Poland Decl. ¶ 10, Ex. 9 at 9:13-18 (emphasis added). Such a sweeping assertion of privilege would be unfounded in any context. It is even more brazen given the fact that Mr. Handrick is neither attorney nor client nor legislator.

The attorney-client privilege protects "communications made in confidence by a client and a client's employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice." *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2009). Communications from the attorney to the client are, in turn, "privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence." *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990). As "the party seeking to establish the privilege," the legislature "bears the burden of demonstrating that all of the requirements for invoking the attorney-client privilege have been met." *In re Grand Jury Proceedings*, 220 F.3d at 571. "The claim of privilege cannot be a blanket claim; it must be made and sustained on a

question-by-question or document-by-document basis." *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (internal citation omitted).

The legislature grounds its claim of privilege in the *Kovel* doctrine, which analogized an accountant translating "a complicated tax story" to a linguist interpreting one language to another—a function that is "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961). However, the legislature has presented no evidence that any translation, literal or figurative, was necessary or that Mr. Handrick has unique expertise that would equip him to perform such a service. "Mr. Handrick does not have a law degree or any degree in political science or statistics; his only qualifications appear to be his prior service as a member of the State Assembly." Dec. 20 Order at 7; *see also* Poland Decl. ¶ 10, Ex. 9 at 24:23-25, 53:23-54:4. What's more, the legislature has the institutional knowledge, capacity, and understanding to undertake the redistricting process without a "translator" facilitating communication with its attorneys. *Kovel* is inapplicable.

Indeed, the nature of the work Mr. Handrick "performed" is still unclear. Brief at 3. Discovery would permit its definition, but that has been thwarted. The difference between Mr. Handrick's role as a "lobbyist" or a "consulting expert" or a "government relations specialist" is difficult to determine, practically or legally. Brief at 3, 11. The legislature contends that only "[p]rivate interests hire lobbyists . . . ." *Id.* But that is precisely the point. Mr. Handrick's interests in the process—as a consultant or a lobbyist—are still unknown. The "evidence" is incomplete because the legislature has ignored the Court's orders to provide all evidence to which plaintiffs are entitled. The serial objections to plaintiffs' questions prevented any exploration.

In fact, the legislature goes even farther: "Mr. Handrick was effectively a short-term legislative staffer." Brief at 19 & n.7. The legislature could have hired Mr. Handrick—or someone with more beneficial qualifications—to a staff position. It certainly would have been less expensive. But he couldn't have continued his work as a lobbyist. *See* Wis. Stat. § 19.45(7) (2009-10).

The legislature also persists in the fiction that Mr. Handrick had been "hired" by its private law firm. Brief at 3. Indeed, the legislature contends, he "had been retained by outside counsel . . . ." That statement is incorrect, contradicted by the Court's finding and the retention correspondence, which leaves no doubt that the legislature is the "Client." *See* Dec. 20 Order at 3; Declaration of Eric M. McCleod (Dkt. 78), ¶¶ 2-4, Ex. 1-3. While the legislature cites Mr. Handrick's "ethical duties," Brief at 8, moreover, it provides no explanation or citation for those duties. He surely is not bound by the code of professional conduct, for he is not a lawyer.

Questions over privilege do not end with Mr. Handrick. "No party disputes," according to the legislature, "that confidential communications between Michael Best lawyers and the . . . Legislature" are privileged. Brief at 6-7. Plaintiffs do, in fact, dispute that notion. The law firm became a clubhouse and a mailbox for lawyers and non-lawyers, lobbyists and consultants, to come and go and exchange e-mail freely to provide their "assistance" with redistricting. In addition to lawyers and a select few legislators, participants in the redistricting discussions included a litany of non-attorney, non-legislative consultants and third parties, including Joseph Handrick, Keith Gaddie, Scott Jensen, Mark Jefferson, Mike Wild, Elisa Alfonso, Alonzo Rivas, Jesus (Zeus) Rodriguez, Prospectre Rivera, Gerard Randall, and Robert Spindell. *See* Poland Decl. ¶ 10, Ex. 9 at 41:15-43:20, 227:21-228:17; ¶ 14, Ex. 10 at 32:2-36:2, 197:22-200:17; ¶ 17, Ex. 12 at 34:13-57:22, 76:18-78:7, 83:2-84:10, 86:10-93:22, 117:20-125:11; ¶¶ 20-21, Ex. 14-16.

The attorney-client privilege is limited to "communications made in confidence by a client and a client's employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice." *Sandra T.E.*, 600 F.3d at 618. As discovery continues, the legislature's own privilege assertions for its law firm will be at issue. The advice given the legislature seems to have been widely given, but only discovery will tell.

In short, the legislature has failed to sustain its burden to establish that the attorney-client privilege protects any communications involving Mr. Handrick, particularly given that this is its third attempt at doing so. The Court should decline the legislature's invitation to revisit its previous two orders.

III. ANY LEGISLATIVE PRIVILEGE HAS BEEN WAIVED AND, IN ADDITION, IS OVERCOME BY PLAINTIFFS' SHOWING OF NEED.

To advance its assertion of legislative privilege, the legislature simultaneously urges the Court to copy *Fair Map*'s application of the five-factor test and to reject *Fair Map*'s discussion of waiver. Neither course is appropriate. There is no assertion here that Acts 43 and 44 were negotiated by legislators in private or even in a government building. The negotiations, however limited, were conducted at a law office and through the lawyers' e-mail correspondence with a host of third parties, and the parade of participants went beyond legislators and Mr. Handrick. The Court's analysis was right the first (and second) time—there is no legislative privilege.

Although *Fair Map* was, like the present case, a redistricting dispute, the factors to be weighed reflect the *process* employed by the legislature, which could hardly have been more different. In Illinois, the General Assembly "was primarily responsible for drafting, revising and approving the 2011 Map." *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 11 C 5065, 2011 U.S. Dist. LEXIS 117656, at *28 (N.D. Ill. Oct. 12, 2011). In Wisconsin, that responsibility was subcontracted to a lobbyist and a law firm, with the public process lasting a

mere 12 days and including just one public hearing. *See* Defs.' Amended Answer and Affirmative Defenses to Second Amended Complaint for Declaratory and Injunctive Relief (Doc. 66) at 15. As a result, there is little publicly available evidence, and any chilling effect is minimized because constitutional responsibilities are not typically outsourced. Those factors, combined with "the highly relevant and potentially unique nature of the evidence," "the serious nature of the issues in this case," and "the government's role in crafting the challenged redistricting plans," all weigh decisively in favor of disclosure. Dec. 8 Order at 4. Whatever privilege the legislature has, its own conduct and the plaintiffs' need overcome it.

Although it asks this Court to import *Fair Map*'s factual analysis to a different set of facts, the legislature also wants the Court to reject *Fair Map*'s reliance on *ACORN I*, a New York federal district court decision. However, a closer reading of the *ACORN* decisions, whatever their precedential value, only reinforces the legislative privilege's inapplicability here. The consulting firm in *ACORN* "investigated and prepared a report from which legislation was introduced." *ACORN v. County of Nassau*, No. 05-2301, 2007 U.S. Dist. LEXIS 71058, at *19 (E.D.N.Y. Sept. 25, 2007) ("*ACORN I*"), *aff'd*, *ACORN v. County of Nassau*, No. 05-2301, 2009 U.S. Dist. LEXIS 82405 (E.D.N.Y. Sept. 10, 2009) ("*ACORN II*"). Only the legislative deliberations that followed the report's presentation to the board were privileged; no privilege covered the consultants as they developed their recommendation. *Id.*

Applying that same logic here, no legislative privilege covers the time that Mr. Handrick was drafting the district maps. Only after Mr. Handrick had developed the legislation and delivered it to the legislature for deliberation—a handoff that presumably occurred shortly before the 12-day period in which the plan was available to the public—could any privilege apply, and then only to deliberations *among legislators*. However, plaintiffs' deposition questions and

document requests concern the *development* of the district map and are—even under the legislature's reading of *ACORN*—unprotected.

ACORN I relied, in turn, on *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y.) *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003), a redistricting case more closely analogous. The redistricting plan at issue in *Rodriguez* was developed by "an advisory group" that, "by statute, ha[d] the powers of a legislative committee" but "involved the participation of nonlegislators (at least one of whom evidently was not a governmental employee)." *Id.* at 101. In *denying* an assertion of legislative privilege, the court explained:

> By delegating the complex process of developing a redistricting plan in this manner, the Legislature created a working group which, by statute, necessarily contained legislative "outsiders." While the political reality may be that these "outsiders" are consummate insiders . . . , the fact that [the group] was constituted in this fashion tends to weaken any claim that the disclosure of [the group's] deliberations and documents would cause future members of the Legislature not to engage in frank discussions of proposed legislation. Indeed, the legislatively-mandated structure of [the group] makes its workings more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation—a session for which *no one* could seriously claim privilege.

Id. (granting motion to compel "insofar as it seeks information concerning the operations of [the group] which is not protected by a privilege other than the legislative privilege"). The advisory group in *Rodriguez* had far more legitimacy than Mr. Handrick: a creature of statute, it consisted of four legislators and two non-legislators and *published* the redistricting plan it proposed. *Id.* at 92-93. Yet, despite those features, the court refused to confer any legislative privilege on the activities of the advisory group; only "information concerning the actual deliberations of the Legislature . . . which took place outside [the group], or after the proposed redistricting plan reached the floor of the Legislature," received any protection. *Id.* at 102-03. Applying that rule

by analogy to Mr. Handrick, nothing he did—and no communication he sent or received to anyone, anywhere—is privileged.

The legislature, citing *International Travelers Cheque Co. v. BankAmerica Corp.*, 660 F.2d 215, 222 (7th Cir. 1981), defines "waiver" as "a voluntary and intentional relinquishment or abandonment of a known existing right or privilege." It cannot have waived its privilege, the legislature says, because it never intended to do so. Of course, *International Travelers Cheque* had nothing to do with privileges of any kind—the "waiver" at issue was of venue rights under the National Bank Act, *id.* at 216, which is of no relevance here. Privileges are *always* forfeited when they are disclosed beyond the protected parties in a communication, regardless of whether the disclosing party was conscious of that result. *See*, *e.g.*, *ACORN I*, 2007 U.S. Dist. LEXIS 71058, at *13 (citing *Almonte v. City of Long Beach*, No. 04-4192, 2005 U.S. Dist. LEXIS 37528, at *9-10 (E.D.N.Y. Aug. 16, 2005)). The holders of a privilege cannot reveal "confidential" communications to some third-parties and then claim privilege as to others. That disclosure—and the resulting waiver—here was wholesale.

Whatever the scope of the "legislative privilege," the Court already has found it inapplicable. Mr. Handrick is not a legislative employee. Moreover, whatever the privilege's application to communications between staff members and individual legislators, the redistricting process here permitted lawyers, lobbyists, and other "interested" parties to range far and wide—to a national political party, for example. *See* Poland Decl. ¶ 14, Ex. 10 at 197:22-200:17.

The legislature's repeated use of the phrase "within governmental walls," citing *Fair Map*, is particularly ironic. Brief at 13. The walls here were not the legislature's—they were

those of a law office across the street from the State Capitol building—and they were ephemeral. There is no privilege here.

IV. MR. HANDRICK QUALIFIES FOR NO WORK PRODUCT PROTECTION.

The legislature persists in insisting that Mr. Handrick is an expert retained in anticipation of litigation and that nothing he prepared can therefore be subject to discovery. Even if legislation is contentious and litigation related to the legislation can be foreseen, documents prepared *to draft legislation* are not "prepared in anticipation of litigation." The Court already has refused, with good reason, "to travel that road, for it would 'be both unseemly and a misuse of public assets' to permit an individual hired with taxpayer money 'to conceal from the taxpayers themselves otherwise admissible evidence' of allegedly unconstitutional motives affecting their voting rights." Dec. 20 Order at 4 (quoting *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002)).

The legislature's insistence that "redistricting legislation was not a run-of-the-mill legislative act" is hardly reassuring. Brief at 20. The legislature's function is to draft legislation; no matter how predictably litigation may follow, drafting statutes does not and cannot trigger work product protection. That is always true but especially when the work has been subcontracted.

Furthermore, the privilege concerning "non-testifying experts" applies only to "parties." Fed. R. Civ. P. 26(b)(3)(A) & (b)(4)(D). The legislature is not. The "touchstone" of these rules, according to the legislature, is the "anticipation of litigation." To the contrary, the touchstone is party status. "Anticipation of litigation" is, however, the touchstone for the duty to preserve documents—yet Mr. Handrick testified that he *did not retain* e-mail communications and other documents concerning redistricting. Poland Decl. ¶ 10, Ex. 9 at 22:3-12, 29:9-31:20, 139:3-23,

140:12-141:5, 166:23-167:12, 172:15-23, 249:4-10.[3] The legislature cannot cite its anticipation of litigation to invoke a privilege when it ignored its accompanying obligation to preserve evidence. That, of course, is a matter for another motion.

The legislature criticizes the Court for concluding, based on *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992), that discovery can be had from a consulting expert who "was an active participant in the events which form the subject matter of this litigation." Brief at 10 (citing Dec. 20 Order at 7). However, *Marylanders* was first introduced *by the legislature* to support its position. The very point of law that the legislature now disclaims was cited in the legislature's previous motion. *See* Motion for Clarification (Dkt. 77) at 3 (acknowledging *Marylanders* court's conclusion that "an expert consulting in the redistricting process could be subject to fact discovery if he was an active participant in the redistricting process"). Now, in its latest motion, the legislature tries to discredit its own authority—emphasizing that the "court in *Marylanders* cites no authority for this proposition" and that "no other court (in almost 20 years) has cited *Marylanders* for this principle." Brief at 10. The only credibility lost is that of the legislature.

Having cited this very language in its previous motion, the legislature now purports to be "unaware" of "what the phrase 'active participant' means in this context." *Id.* An "active participant" is a fact witness, not a consulting expert. For example—an "expert" hired to perform a legislative act would be an "active participant" in that process and, therefore, a fact witness as to legislative intent. Any protections associated with "consulting experts" would be

[3] They may be captured in his employer's archival system but that has not yet been explored. Messrs. Foltz and Ottman likewise testified that they were not instructed to preserve any of the materials they created in the redistricting process, and that they in fact did not retain at least some number of the documents, data, e-mails, text messages, and filed they created. Poland Decl. ¶ 14, Ex. 10 at 56:20-57:2, 59:21-60:23, 86:23-87:7, 127:23-129:11; ¶ 17, Ex. 12 at 163:8-25.

lost. Mr. Handrick is not (and never was) a consulting expert, and he accordingly receives no work product protection.

V. SANCTIONS SHOULD BE IMPOSED, AND FEES AND COSTS AWARDED, FOR THE LEGISLATURE'S WILLFUL DISREGARD OF THE COURT'S ORDER.

The "Motion for Review" addresses only "the scope of discovery that may be permitted of [its] consulting expert . . . ." Brief at 1. But the litigative approach reflected in the latest motion no doubt will continue in light of the litany of objections to the questions asked of Messrs. Foltz and Ottman, the two legislative staff members identified in defendants' Rule 26 disclosures and deposed last week.

The Court has twice deferred an award of sanctions. It should no longer. Notwithstanding this Court's discovery orders, the legislature—supported by the Department of Justice for the defendants—turned last week's depositions into a parody of the discovery process, particularly in litigation where trial is right around the corner and the need for expeditious discovery is so great. Even in the absence of the public interest involved in this litigation, or the speed it demands, the Court should not permit that defiance to continue.

It is all too clear what happened here. Early this year, facing its constitutional redistricting obligation, the legislature wanted to conduct the process in secrecy. It had one hearing. The two principal witnesses are the same individuals whom the plaintiffs subpoenaed but who were instructed not to answer deposition questions. Someone, somewhere, made the assumption that convening at the office of a law firm with a lobbyist, rather than in public or even in the capitol, would be more comfortable.[4] But they were mistaken.

[4] The Court will note the repeated references to the work done "at the offices of Michael Best . . . ." Brief at 3. 10.

CONCLUSIONS

This is the third time in as many weeks that plaintiffs are re-litigating the same question. The legislature's obstructionist approach is costing time and money, and the pattern is unlikely to end absent further Court intervention. Plaintiffs therefore request an award of plaintiffs' attorney's fees and costs associated with (1) responding to this motion and the two that preceded it; (2) reconvening forthwith the depositions already conducted, directing that the questions be answered; and (3) any further costs and attorneys' fees associated with ensuring the legislature's and defendants' full compliance with their discovery obligations and this Court's orders.

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